

U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 MASS, 3/F  
Washington, D.C. 20536

FILE:

OFFICE: CALIFORNIA SERVICE CENTER

DATE: **AUG 18 2003**

IN RE: Applicant:

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



**PUBLIC COPY**

INSTRUCTIONS:

Attached is the decision rendered on your appeal. The file has been returned to the Service Center that processed your case. If your appeal was sustained, or if your case was remanded for further action, the Service Center will contact you. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status was denied by the Director, Western Regional Processing Facility. It is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because of the applicant's criminal record.

On appeal, counsel states that the applicant's due process was violated because he did not know or understand the consequences of his plea. According to counsel, the applicant is also seeking vacation of his state court record of conviction and will submit proof of the vacation. The file contains no further response from counsel or the applicant.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. 245a.2(c)(1).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act, formerly section 212(a)(9) of the Act.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, reh'g denied, 341 U.S. 956 (1951).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act. An alien is also inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act, formerly section 212(a)(23) of the Act.

The record reveals that on March 17, 1986 the applicant was convicted of a violation of section 11352 H & S, transportation for sale of controlled substance (cocaine), a felony.

On appeal, counsel contends that the applicant was not advised of collateral consequences of his guilty plea, as required by state law. As a result, counsel attempts to seek a collateral attack on the conviction record. Counsel acknowledges that collateral attacks are generally not permitted in Bureau proceedings, but points out that exceptions are made. According to counsel, a gross miscarriage of justice would occur if the applicant is denied benefits based on this conviction. Counsel cites *Matter of Malone*, 11 I&N Dec. 730 (1966) and *Matter of Farinas*, 12 I&N Dec. 467 (1967). In both of those cases prior decisions of the Service (now the Bureau) or special inquiry officers were overruled. However, the current matter involving a criminal conviction in a state court is fundamentally different. This office is not the proper forum to render a collateral attack upon a criminal conviction. Finally, it is also noted that the record reflects that the applicant signed a statement in which he declared that he had read and understood the court order regarding his conviction.

Counsel also states that it is disputable whether this offense is a crime involving moral turpitude. However, the applicant's conviction for transportation for sale of cocaine clearly falls within the purview of a crime involving moral turpitude as described above.

In addition, counsel maintains that the applicant is moving to seek a vacation of the conviction. There is no indication the conviction was ever vacated. Expungement of drug-related convictions will not eliminate the convictions as a bar to legalization eligibility. See *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); *Matter of A-F-*, 8 I&N Dec. 429 (BIA, A.G. 1959). Furthermore, any pardon granted by the President of the United States or by the governor of any state would likewise be ineffective in overcoming the applicant's inadmissibility under section 212(a)(2)(A)(i)(II). See *Matter of Lindner*, 15 I&N Dec.

170, 171 (BIA 1975); *Matter of Lee*, 12 I&N Dec. 335, 337 (BIA 1967); *Matter of Yuen*, 12 I&N Dec. 325, 327 (BIA 1967). An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, Int. Dec. #3377 (BIA 1999); *Murillo-Espinoza v. INS*, 261 F. 3d 771 (9th Cir. 2001).

The applicant is ineligible for temporary resident status because of his felony conviction. 8 C.F.R. 245a.2(c)(1). In addition, he is inadmissible because of his narcotics conviction concerning a crime involving moral turpitude. Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States. Furthermore, there is no waiver available to an alien inadmissible due to a narcotics conviction except for a single offense of simple possession of thirty grams or less of marijuana. See section 245A(d)(2)(B)(ii) of the Act.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. 245a.2(d)(5). The applicant has failed to meet this burden.

**ORDER:** The appeal is dismissed. This decision constitutes a final notice of ineligibility.